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Petra Jaya Transport v Public Prosecutor

HIGH COURT (KUCHING) — CRIMINAL APPEAL NO 41-17-OF 1998-II
MUHAMMAD KAMIL J
11 JUNE 1999

B ***Labour Law*** *— Provident Fund — Contributions — Arrears of — Employer convicted of charge of non-contribution — Application for order that employer pay outstanding arrears of contributions of other employees for which no charge had been preferred — Whether the Employees Provident Fund Act 1991 s 63(1) mandatory*

The appellant was charged under s 43(2) of the Employees Provident
C Fund Act 1991 ('the EPF Act') for failing to pay Employee Provident Fund ('EPF') contributions in respect of three of its employees. The magistrate found the appellant guilty. The appellant was convicted and fined. Subsequently, the respondent made an application under s 63(1) of the EPF Act seeking an order that the appellant pay the outstanding arrears of contributions of other employees of the
D appellant for which no charge had been preferred. It was submitted that s 63(1) of the EPF Act is mandatory. A person who is convicted of an offence under s 43(2) or 48(3) of the EPF Act shall pay the arrears of contribution as certified by the accountant of the EPF. The appellant objected to this application.

E **Held:**

It is clear from s 63(1) of the EPF Act that an employer who is found guilty of the offence under s 43(2) or 48(3) of the EPF Act, the court shall make an order that the employer pay into the EPF the amount of contributions as certified by an officer of the board.
F Using the purposive approach of construction, the order to pay the contributions does not form part of the penalty as imposed by the offence under s 43(2) or 48(3) of the EPF Act. The board has to calculate and submit the amount of contributions as certified by its authorized officer, to the employer. The certificate by the board is not conclusive evidence, and it is open to challenge by the
G employer as to the correctness of the contents in the certificate. It is fair and just that the employer must be given the opportunity to do so (see p 580H–I, 581A).

H **[Bahasa Malaysia summary**

Perayu telah didakwa di bawah Akta Kumpulan Wang Simpanan Pekerja 1991 ('Akta KWSP') kerana gagal membayar sumbangan Kumpulan Wang Simpanan Pekerja ('KWSP') berkenaan dengan tiga orang pekerjanya. Majistret telah mendapati perayu bersalah. Perayu telah disabitkan dan didenda. Kemudian, responden membuat
I permohonan untuk di bawah s 63(1) Akta KWSP untuk memohon perintah bahawa perayu membayar baki tunggakan sumbangan pekerja-pekerja perayu yang lain di mana tiada dakwaan telah dibuat.

Ia dihujahkan bahawa s 63(1) Akta KWSP adalah mandatori. Seseorang yang disabitkan untuk suatu kesalahan di bawah s 43(2) atau 48(3) Akta KWSP mestilah membayar tunggakan sumbangan yang disahkan oleh akauntan KWSP tersebut. Perayu membantah permohonan ini.

Diputuskan:

Ia adalah jelas daripada s 63(1) Akta KWSP bahawa seorang majikan yang didapati bersalah untuk kesalahan di bawah s 43(2) atau 48(3) Akta KWSP tersebut, mahkamah akan membuat perintah bahawa majikan tersebut membayar tabung tersebut jumlah sumbangan yang disahkan oleh pegawai lembaga tersebut. Dengan memakai pendekatan tujuan, perintah untuk membayar sumbangan-sumbangan tidak membentuk sebahagian penalti seperti yang dikenakan oleh kesalahan s 43(2) atau 48(3) Akta KWSP. Lembaga tersebut telah mengira dan menyerahkan jumlah sumbangan-sumbangan seperti yang disahkan oleh pegawai yang berkuasa, kepada majikan. Sijil oleh lembaga tersebut bukanlah keterangan konklusif dan ia adalah terbuka untuk dicabar oleh majikan berkenaan dengan kesahihan kandungan-kandungan sijil tersebut. Ia adalah adil dan saksama bahawa majikan mestilah diberikan peluang untuk berbuat demikian (lihat ms 574A–D, F).]

Notes

For cases on provident fund generally, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 1157–1173.

Cases referred to

Nairn v University Of St Andrews & Ors (1909) AC 147 (refd)
Nothman v Barnet London Borough Council [1978] 1 WLR 221 (refd)
Pendakwa Raya lwn LCY Holdings Sdn Bhd [1991] 3 CLJ 2812 (refd)
Pendakwa Raya lwn Syarikat Soon Seng Electrical Work (Shah Alam High Court Criminal Appeal No 51-39-88) (refd)
PP v Kats Cleaning Services (S) Sdn Bhd [1995] 1 CLJ 561 (refd)
PP v Silectron Sdn Bhd [1993] 2 AMR 1172 (refd)
United Hokkien Cemeteries, Paning v The Board, Majlis Perbandaran Pulau Pinang [1979] 2 MLJ 121 (refd)
Wong Pot Heng v Hj Zainal Abidin Puteh & Anor [1990] 2 CLJ 174 (refd)

Legislation referred to

Employees Provident Fund Act 1951 ss 16A(1)(c), (4)
Employees Provident Fund (Amendment) Act 1980
Employees Provident Fund Act 1991 ss 43(2), 48(3), 63(1)
Employee's Social Security Act 1969 ss 7, 94(c), 94A(1)

HC Lee (*HC Lee & Partners*) for the appellant.

A *Marutin Pagan* (Attorney General's Chambers) for the respondent.

Muhammad Kamil J: The appellant was charged with three counts under s 43(2) of the Employees Provident Fund Act 1991 ('the EPF Act') for failing to pay Employee Provident Fund ('EPF') contributions in respect of three of its employees. The magistrate found the appellant guilty on one B charge, convicted and fined him RM1,200 in default one month's imprisonment. The appellant appealed against the conviction and sentence, but later the appeal was withdrawn and it was struck off on 9 April 1999.

On 29 September 1998, the respondent, by an application under s 63(1) of the EPF Act, sought a court order that the appellant pay the C outstanding arrears of contributions of other employees of the appellant for which no charge had been preferred, and which amounted to RM149,709. The appellant objected to this application and in support cited *PP v Silectron Sdn Bhd* [1993] 2 AMR 1172.

The deputy public prosecutor submitted that s 63(1) of the EPF Act is mandatory. A person who is convicted of an offence under ss 43(2) or 48(3) D of the EPF Act shall pay the arrears of contributions as certified by the accountant of the EPF.

Learned counsel, Mr HC Lee, submitted that there were two conflicting authorities on the interpretation of the provisions of law on the payment of contributions which is the subject matter of an offence E committed under two different statutes, namely the view held by *PP v Silectron Sdn Bhd* and the view held by *PP v Kats Cleaning Services (S) Sdn Bhd* [1995] 1 CLJ 561.

It is observed that these two cases can be distinguished. The former case is on the interpretation of ss 16A(1)(c) and 16A(4) of the EPF Act 1951 ('the Act') (which Act was amended by the EPF (Amendment) Act F 1980 and later replaced by the EPF Act), and the latter is on ss 7 and 94A(1) of the Employee's Social Security Act 1969. Both cases are not directly on the interpretation of s 63(1) of the EPF Act which is under consideration in the instant case, and therefore they are of persuasive value only.

G Section 63(1) of the EPF Act states:

> Court Order
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> (1) Notwithstanding the provisions of any other written law, where an employer is guilty of an offence under ss 43(2) or 48(3) of the EPF Act, the court before which the employer is found guilty shall order such an employer to pay to the fund the amount of contributions, together with H any dividends credited thereon, due and payable to the board and certified by an officer authorized by the board to be due from such employer, prior to the date of such finding of guilt.

In approaching the question of interpreting words used in statutes, it is necessary to keep in mind the presumption that words in a statute are I strictly and correctly used. As Lord Hewart CJ said:

> It ought to be the rule, and we are glad to think that it is the rule that words are used in an Act of Parliament correctly and exactly, and not loosely and

> inexactly. Upon those who assert that that rule has been broken, the burden of establishing their proposition lies heavily. And they can discharge it only by pointing to something in the context which goes to show that the loose and inexact meaning must be preferred.' *Spillers Ld v Cardiff (Borough) Assessment Committee* [1931] 2 KB 21, quoted with approval by Lord McMillan in *New Plymouth Borough Council v Taranaki Electric-Power Board* [1933] AC 680 at p 682.

It is also necessary to remember the caution given by Lord Loreburn LC in *Nairn v University Of St Andrews & Ors* [1909] AC 147 at p 161:

> It is a dangerous assumption to suppose that the legislature foresees every possible result that may ensue from the unguarded use of a single word, or that the language used in statutes is so precisely accurate that you can pick out from various Acts this and that expression and, skilfully piecing them together, lay a safe foundation for some remote inference. Your Lordships are aware that from early times, courts of law have been continuously obliged, in endeavouring loyally to carry out the intentions of Parliament, to observe a series of familiar precautions for interpreting statutes, so imperfect and obscure as they often are.

In this interpretation of s 63(1) of the EPF Act, it is necessary to find out the intention of Parliament in enacting this statute by using the purposive approach. In *United Hokkien Cemeteries, Paning v The Board, Majlis Perbandaran Pulau Pinang* [1979] 2 MLJ 121, Chang Min Tat FJ said:

> The literal method of construction is now completely out of date and has been replaced by a 'purposive approach'. It ought to be noted that this purposive approach is not a modern fashion. Since the 17th century, it has been the task of the judiciary to interpret an Act 'according to the intent of them that made it': Coke 4 Inst 33.

Citing Lord Denning's decision in *Nothman v Barnet London Borough Council* [1978] 1 WLR 221, the learned judge said:

> Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it — by reading words in if necessary — so as to do what Parliament would have done, had they had the situation in mind.

In *Wong Pot Heng v Hj Zainal Abidin Puteh & Anor* [1990] 2 CLJ 174, Mohd Azmi SCJ (as he then was) said that:

> The purposive construction of statutes was first adopted by the House of Lords in *Foothergill v Monarch Airlines* [1980] 3 WLR 221. It is a well established principle that the purposive approach to the interpretation of legislation only applies where any doubt arises from the terms or words employed by the legislature. But where the words are precise and unambiguous, then the literal and strict construction rule should apply.

It is clear from s 63(1) of the EPF Act that where an employer who is found guilty of the offence under s 43(2) or 48(3) of the EPF Act, the court shall make an order that the employer pay the fund the amount of contributions, together with any dividends credited, as certified by an officer of the board. It seems to me, using the purposive approach of construction, that the order

A to pay the contributions does not form part of the penalty as imposed by the offence under s 43(2) or 48(3) of the EPF Act. That is to say, the board has to calculate and submit the amount of contributions as computed by the board, ie its authorized officers, to the employer. To my mind, the certificate by the board is not conclusive evidence and it is open to challenge by the employer as to the correctness of the contents in the certificate. It is B fair and just that the employer must be given the opportunity to do so. There are a number of reasons for this. First, there is nothing in the EPF Act to say that the certificate is conclusive and cannot be challenged. Secondly, if the employer is obliged to pay such contributions, it is fair that he must be given the opportunity to satisfy himself as to the correctness of C the amount which he has to pay. This found support in *Pendakwa Raya lwn LCY Holdings Sdn Bhd* [1991] 3 CLJ 2812, where Abdul Aziz J in interpreting the old s 16A(4) of the Act as amended by EPF (Amendment) Act 1980, said:

> D Di bawah sub-s (4) baru, amaun caruman dan dividen yang wajib diperintahkan oleh mahkamah supaya dibayar bukan sahaja sebagaimana diperakui oleh pegawai lembaga kumpulan wang sebagai kena dibayar yang diperuntukan (di bawah sub-s (4) lama) tetapi mestilah juga 'due and payable to the board'. Syarat tambahan ini bererti ini membawa implikasi bahawa ketepatan perakuan itu boleh dicabar.

In *Pendakwa Raya lwn Syarikat Soon Seng Electrical Work* (Shah Alam High E Court Criminal Appeal No 51–39–88), in respect of s 16A(4) of the Act, Shankar J (as he then was) was of the opinion that s 18A of the Act makes the certificate prima facie evidence of the truth of the contents. As the respondent did not challenge the certificate, the court must make the order asked for.

F In *PP v Silectron Sdn Bhd's* case, the respondent was charged and convicted in relation to two offences under s 16A(1)(c) of the Act. The appellant then applied for an order under s 16A(4) of the Act for the respondent to make payment in respect of the outstanding arrears which were not comprised in the charge. The learned magistrate dismissed the application. The appellant appealed. The High Court held:

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> (i) bearing in mind the whole scheme of s 16A and the words in (4) 'Upon being found guilty of any offence under s 16A(1)(c)', the only order which the court must make under s 16A(4) is one that relates only to the contribution which is the subject matter of the offence under s 16A(1)(c) for which there has been a guilty verdict; and
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> H (ii) laws which impose criminal or other penalties, such as the EPF Act must be strictly construed and any ambiguity in the words must be resolved in favour of the citizen.

In *Pontian Bas Bhd v PP* [1987] 2 MLJ 646, KC Vohrah J held that the provisions of s 16A(4) of the Act are mandatory and they impose an obligation on the part of the court to order the employer to pay the arrears I upon conviction after certification by the board's accountant of the arrears owing prior to the date of the conviction. It was also held that the arrears of contributions by their very nature constituted a civil debt and were not

ordered to be paid by way of a penalty. In that case, the appellant was charged under s 16A(1)(c) of the Act for failing as an employer to remit contributions in respect of certain employees. The appellant pleaded guilty to the charges and was convicted and fined a sum of $4,320. The appellant was ordered to pay the board arrears of contributions amounting to $28,325. See also *Pendakwa Raya lwn LCY Holdings Sdn Bhd* .

In *PP v Kats Cleaning Services*, the defendant pleaded guilty to six offences under s 7 of the Employees' Social Security Act 1969 ('the 1969 Act') and reg 32 of the Employees' Social Security (General) Regulations 1971 for failing to pay the required contributions in respect of their employees. The prosecution tendered the certified statement of arrears of contributions under s 94(c) of the 1969 Act. The learned magistrate declined to make the order, and held that the prosecution could only recover contributions in respect of the subject matter of the offence for which there was a finding of guilt, but not otherwise. On appeal, the High Court held that s 94(1) of the 1969 Act empowered the court to make an order in respect of any contributions which were not the subject matter of the charge against the respondent and for which there was no finding of guilt.

Section 16A(4) of the Act reads:

> Upon being found guilty of any offence under s 16A (1)(c), the Court before which the employer is found guilty shall order such employer to pay to the Board the amount of any contributions, together with any interest credited thereon, due and payable to the Board and certified by the Accountant of the Board to be due from such employer, prior to the date of such founding of guilty and such contributions shall be recoverable in the same manner as a fine; and any order made under this subsection shall be appealable as if it were an order for payment of compensation under s 426 of the Criminal Procedure Code.

The learned counsel for the appellant submitted that s 16A(4) of the Act is replaced by s 63(1) of the EPF Act. In the instant case, the respondent applied to the court for an order against the appellant for arrears of contributions of the other employees as well which amounted to RM149,719. He urged the court to follow the ratio decidendi of the case of *PP v Silectron*.

Under s 16A(4) of the Act, the words used are 'the amount of any contributions', whilst in s 63(1) of the EPF Act, the words used are 'the amount of contributions'. The learned counsel contended that in the former, it has a wider meaning and may include other contributions which are not the subject matter of the charged preferred against the accused, whereas in the latter, it has a narrow and restrictive meaning and it refers only to the contributions and its arrears of the employee whose contribution is the subject matter of the charge.

Order accordingly.

Reported by Jafisah Jaafar